

DJW/mat

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

KORY A. WELCH,

Plaintiff,

v.

No. 03-2132-JWL-DJW

CENTEX HOME EQUITY CO., LLC, et al.,

Defendants.

MEMORANDUM AND ORDER

Pending before the Court is Defendant Producers Mortgage Corporation's ("Producers") Motion to Suppress Evidence in Limine and Compel (doc. 107) and Defendant Kerstin Siley's Motion for an Order in Limine and Motion to Compel (doc. 112). More specifically, these Defendants assert Plaintiff improperly served two subpoenas without providing other parties prior notice as required by Fed. R. Civ. P. 45(b)(1). As a result, these Defendants maintain Plaintiff should be prohibited from using at trial all documents obtained in response to the subpoenas. Finally, these Defendants seek to compel Plaintiff to identify any other "secret" subpoenas she has served and any information she has obtained through such secret subpoenas.

Relevant Background

The Court provides the following chronology of relevant events leading up to these Motions:

- On December 29, 2003, Plaintiff served two subpoenas in this matter:
 1. A subpoena commanding the Iowa Division of Banking to produce documents related to the suspension, revocation or other disciplinary action taken against Kerstin Siley, formerly a loan officer with the Iowa Funding Corporation, on or before January 16, 2004; and
 2. A subpoena commanding witness Eli Contreras
 - to produce documents on or before January 8, 2004; and
 - to personally appear for oral deposition on January 16, 2004.
- Plaintiff did not provide prior notice of either subpoena to any other party in this action.
- On January 5, 2004, the Iowa Division of Banking sent Plaintiff all documents responsive to the subpoena.
- Eli Contreras asserts he has no documents responsive to the subpoena; thus, Eli Contreras has not produced any documents to date.
- At some time after the deposition subpoena was served upon Eli Contreras, but before the January 16, 2004 scheduled deposition, Plaintiff’s counsel agreed to postpone the deposition of Eli Contreras.
- On January 9, 2004, Plaintiff filed with the Court a proof of service of the subpoenas.

Discussion

A. Federal Rule of Civil Procedure 45(b)(1)

The federal rules require that “[p]rior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed

by Rule 5(b)” of the federal rules of civil procedure.¹ Rule 5(b) provides that a party can make service either by delivery or mail to the opposing party’s attorney.²

Given Plaintiff does not dispute the facts presented, the Court hereby makes a formal finding that Plaintiff violated Fed. R. Civ. P. 45(b)(1) by failing to provide prior notice of the subpoenas to the other parties to this lawsuit. Such a finding invites consideration of sanctions under Fed. R. Civ. P. 37(c)(1). When a party fails to receive prior notice of the information sought from a non-party, a party is deprived of its greatest safeguard under the Rule, that is, the ability to object to the release of the information prior to disclosure.³ In addition, when an attorney misuses his or her power under Rule 45 to command a non-litigant to produce documents in a lawsuit to which he or she is a stranger by failing to give appropriate notice to the parties, public confidence in the integrity of court processes is eroded.⁴

For her explicit violation of the Rules, the moving Defendants argue Plaintiff should be prohibited from using at trial all documents obtained in response to the subpoenas. Plaintiff disagrees, arguing such a sanction is an unreasonably harsh sanction given the lack of resulting prejudice to Defendants.

As a practical matter, it appears to the extent Plaintiff seeks to use the documents in question at trial, the admissibility of the documents will be determined pursuant to Federal Rule of Evidence;

¹Fed. R. Civ. P. 45(b)(1).

²Fed. R. Civ. P. 5(b).

³*Biocore Med. Tech., Inc. v. Khosrowshahi*, 181 F.R.D. 660, 667 (D. Kan. 1998) (citing *Spencer v. Steinman*, 179 F.R.D. 484, 489-90 (E.D. Penn.1998)).

⁴*Id.*

thus, Defendants will have an opportunity to challenge their admissibility at the appropriate time through a pretrial motion in limine. Given these circumstances, and the availability of other appropriate sanctions as discussed below, the Court does not believe it appropriate to grant the relief sought by the moving Defendants in their motions to suppress, that is, that Plaintiff summarily be precluded from using the documents at trial.

As a sanction, however, Plaintiff's counsel is admonished against issuing any future third party subpoenas without prior notice to all parties. Moreover, Plaintiff's counsel must file an affidavit with the Court, within five (5) days of this order, confirming that all documents produced to Plaintiff pursuant to any and all third party, ex parte subpoenas have been produced to all Defendants. To that end, and due to Defendant Siley's assertion that the documents produced in response to the subpoena are confidential in nature, the Court also will order the parties to submit a jointly proposed protective order limiting the parties' use of the documents to purposes directly related to this litigation and prohibiting their disclosure to anyone outside this litigation.⁵

Accordingly, it is hereby ordered that Defendant Producers' Motion to Suppress Evidence in Limine and Compel (doc. 107) and Defendant Siley's Motion for an Order in Limine and Motion to Compel (doc. 112) are both

- (1) denied, without prejudice to Defendants' ability to file any pretrial motion in limine to exclude the documents received pursuant to the subpoenas at issue or any evidence relating thereto; and

⁵Fed. R. Civ. P. 26(c) (upon a showing of good cause, a court "may make any order which justice requires to protect a party or person from annoyance, embarrassment oppression, or undue burden or expense.").

- (2) granted, to the extent that Plaintiff's counsel is admonished against issuing any future third party subpoenas without prior notice to all parties and, to that end, Plaintiff's counsel must file an affidavit with the Court, within five (5) days of this order, confirming that all documents produced to Plaintiff pursuant to any and all third party, ex parte subpoenas have been produced to all Defendants.

It is further ordered that, within five (5) days from the date of this Order, the parties shall submit a jointly proposed protective order limiting the parties' use of the documents referenced herein to purposes directly related to this litigation and prohibiting their disclosure to anyone outside this litigation.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this _____ day of October, 2004.

David J. Waxse
United States Magistrate Judge

cc: All counsel and *pro se* parties